12-29-1997

Lambert v. Blackwell

Filed January 26, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-1281, 97-1283 and 97-1287

LISA MICHELLE LAMBERT

v.

CHARLOTTE BLACKWELL, MRS., SUPERINTENDENT;
THE ATTORNEY GENERAL OF THE STATE OF
PENNSYLVANIA,

Appellants

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS,
MCKEE and ALARCON,* Circuit Judges.

SUR PETITION FOR REHEARING
(Filed: January 26, 1998)

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Nygaard, Roth, Lewis and McKee would have granted rehearing. Attached is Judge Roth's Opinion Sur Denial in which Judges Nygaard, Lewis and McKee join.

---

*Senior Circuit Judge Alarcon voted only as to panel rehearing.

BY THE COURT,

/s/ Carol Los Mansmann

Circuit Judge

Opinion Sur Denial of the Petition for Rehearing

ROTH, Circuit Judge,

I voted for rehearing in banc because I am profoundly disturbed by the panel's refusal to consider the merits of Lisa Michelle Lambert's petition for a writ of habeas corpus and by the panel's decision to vacate the judgment of the district court and to remand the case with instructions to dismiss Lambert's petition. I am familiar with the merits of the habeas proceeding from reading large portions of the transcript of the proceedings before the district court. As a result, I am aware of the evidence of prosecutorial misconduct that occurred during Lambert's original trial. I find it to be truly shocking. This misconduct included suppression of key evidence, witness tampering, provision of false testimony, and other flagrant violations of Lambert's right to due process.

Once the district court had made factual findings regarding the extent of prosecutorial misconduct,findings that critically undermined the validity of the original verdict against Lambert, I find it to be a miscarriage of justice for this Court to turn its back upon the merits of her petition.

Moreover, I differ with the panel's conclusion that a failure to exhaust was not excused by the facts of this case. I find sufficient the district court's determination that the Commonwealth had waived any exhaustion argument. This finding of waiver was made on April 16, 1997, after the Lancaster County Prosecutor conceded on the record that relief was warranted. The district judge, who was present to assess the statements and the demeanor of the prosecutor, found that the Commonwealth's later attempt to retract the concession was ineffective. Nevertheless, the panel's opinion concludes that the district court erred in finding waiver because of the circumstances in which the concession was made. Panel Opinion at ___ [typescript at 32 n.28]. Because, however, the panel so carefully avoids any consideration of the merits of the case, its opinion fails to note that the Commonwealth's concession was made in the aftermath of the shocking recollection by the victim's mother, Hazel Show, that she had been encouraged by a Lancaster County police officer to suppress critical

information that corroborated Lambert's account of the events surrounding the murder of Laurie Show.

Indeed, even if the district court were to have erred in reaching the issue of actual innocence, once there has been a demonstration of a miscarriage of justice, such as I find here, I cannot turn my back on that showing.

Moreover, even if I were to disregard the Commonwealth's concession that relief was warranted, I believe that proof of a miscarriage of justice to the extent uncovered in this case requires a determination that the issue of exhaustion has been waived. In Granberry v. Greer, a unanimous Court established that "if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the inexhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted." 481 U.S. 129, 135 (1987).

I do not agree that the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has eroded the Court's holding in Granberry. I do not agree that, once such a demonstration of injustice has been placed on the record, we can turn our backs on it under the excuse of AEDPA.

Given the degree of misconduct uncovered during the fourteen days of testimony before the district court, this is unquestionably a case in which the interests of justice demand that the exhaustion requirement be waived.

I will make no statement regarding the propriety of the extent of the relief ordered by the district court. However, I find it impossible to conclude that a habeas petitioner, who has proven by clear and convincing evidence that she has suffered a miscarriage of justice, must return to a prison cell to start her petitions all over again. For the above reasons, I believe that the panel should have reviewed on the merits the district court's granting of the petition for habeas corpus.

Judges Nygaard, Lewis and McKee join in this Opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit